

**Tentative Rulings for August 25, 2016**  
**Departments 402, 403, 501, 502, 503**

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There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

15CECG00741      *Mendoza v. 7th Generation Recycling, Inc.* (Dept. 403)

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The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

15CECG00659      *Reyes v. Barnell* is continued to Thursday, September 1, 2016 at 3:30 p.m. in Dept. 402.

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(Tentative Rulings begin at the next page)

# **Tentative Rulings for Department 402**

(6)

## **Tentative Ruling**

Re: **Gomez v. Prieto**  
Superior Court Case No.: 15CECG02745

Hearing Date: August 25, 2016 (**Dept. 402**)

Motion: By Defendants Luis Esteban Martinez and Mark Quang Chu  
dba Big Realty for determination of good faith settlement

### **Tentative Ruling:**

To deny, without prejudice.

Any new hearing date must be obtained pursuant to The Superior Court of Fresno County, Local Rules, rule 2.2.1.

**IF ORAL ARUGMENT IS REQUESTED IT WILL BE HEARD TUESDAY, AUGUST 30, 2016 IN DEPT. 402.**

### **Explanation:**

Effective July 1, 2016, The Superior Court of Fresno County adopted, via local rule, mandatory electronic filing in unlimited civil cases. (Fresno County Sup.Ct. Local Rules of Court, rule 4.1.13.)

California Rules of Court, rule 2.251 provides, in relevant part:

(c) Electronic service required by local rule or court order

(1) A court may require parties to serve documents electronically in specified actions by local rule or court order, as provided in Code of Civil Procedure section 1010.6 and the rules in this chapter.

(2) Except when personal service is otherwise required by statute or rule, a party that is required to file documents electronically in an action must also serve documents and accept service of documents electronically from all other parties, unless:

(A) The court orders otherwise, or

(B) The action includes parties that are not required to file or serve documents electronically, including self-represented parties; those parties are to be served by non-electronic methods unless they affirmatively consent to electronic service.

Here, the proof of service filed on August 2, 2016, indicates that the parties were all served by the United States mail, not by electronic service. The motion is unopposed; consequently, the defect in service is not waived. (See *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 7.)

## Tentative Ruling

Issued By: JYH on 08/24/16.  
(Judge's initials) (Date)

(24)

**Tentative Ruling**

Re: **Bennett v. Abbott**  
Court Case No. 14CECG01585

Hearing Date: **August 25, 2016 (Dept. 402)**

Motion: 1) Motion for Summary Judgment, or in the Alternative, for Summary  
Adjudication by Defendants Arie Abbott and Central California Faculty Medical Group dba University Oncology Associates ("CCFMG")  
2) Motion for Summary Judgment, or in the Alternative, for Summary  
Adjudication by defendant Fresno Community Hospital and Medical Center dba Community Regional Medical Center, sued herein as California Cancer Center and Community Medical Center ("CRMC")

**Tentative Ruling:**

To grant summary judgment in favor of defendant CCFMG on its motion, as to nominal defendant Mark Alvarez, only. As to plaintiffs, its motion is deemed moot in light of CCFMG's settlement with them, which has already been approved by this court.

To grant summary judgment in favor of defendant Arie Abbott on her joint motion with CCFMG, as to plaintiffs and nominal defendant Mark Alvarez.

To grant summary judgment in favor of defendant CRMC on its motion, as to plaintiffs and nominal defendant Mark Alvarez.

Said defendants are each directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

**IF ORAL ARGUMENT IS REQUESTED IT WILL BE HEARD TUESDAY, AUGUST 30, 2016 IN DEPT. 402.**

**Explanation:**

As moving party, a defendant bears the initial burden of proof to show that plaintiff cannot establish one or more elements of the at-issue cause of action or to show that there is a complete defense. (Code Civ. Proc. § 437c, subd. (p)(2).) Only after the moving party has carried this burden of proof does the burden of proof shift to the other party to show that a triable issue of one or more material facts exists. (*Id.*)

Declarations by expert witnesses are generally required when expert witness testimony would be required at trial (such as on the issue of the standard of care in a professional malpractice case). (See, e.g., *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523.) Such declarations are admissible to support or defeat a summary judgment motion if the requirements for admissibility are established in the same manner as if the declarant was testifying at trial. An expert opinion based on speculation or conjecture is inadmissible. (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.)

California courts have incorporated the expert evidence requirement in ruling on summary judgment motions in medical malpractice cases. "When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Munro v. Regents of Univ. of Calif.* (1989) 215 Cal.App.3d 977, 984-85.)

The declaration must contain facts showing the expert's qualifications (competency) to express the opinion in question; e.g., facts showing the declarant has the training, experience or necessary skill to render an opinion on the particular matters in controversy. (*Salasquevara v. Wyeth Labs., Inc.* (1990) 222 Cal.App.3d 379, 387.) It must also include facts showing: 1) the matters relied upon by the expert in forming the opinion; 2) the declarant's opinion rests on matters of a type reasonably relied upon by experts; and 3) the factual basis for the opinion. (*Kelley, supra*, 66 Cal.App.4th at 524.)

Where the moving party produces competent expert opinion declarations showing that there is no triable issue of fact on an essential element of the opposing party's claim (e.g. that a medical defendant's treatment fell within the applicable standard of care), the opposing party's burden is to produce competent expert opinion declarations to the contrary. (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1487; *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985--"When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence" (citations and internal quotes omitted).)

#### Nominal Defendant:

In this action decedent's husband, Mark Alvarez, was named as a "nominal defendant." An heir named as a defendant in a wrongful death action "is, in reality, a plaintiff." (*Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691, 697; *Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808.) Provided that the nominal defendant is served in the wrongful death action he is properly joined and the "one action rule" applies, which means his and plaintiffs' claims are deemed "joint, single and indivisible" and cannot be split and brought separately. (*Corder v. Corder* (2007) 41 Cal.4th 644, 651; *McDaniel v. Asuncion* (2013) 214 Cal.App.4th 1201, 1206.)

Here, Mr. Alvarez was served with process and filed an Answer on August 13, 2014. He was given notice of both motions for summary judgment/adjudication ruled upon herein. He did not file opposition to either motion.

Motion by Defendants Abbott and CCFMG:

Defendant CCFMG entered into a settlement with the minor plaintiffs, which was the subject of a Petition to Approve Compromise of Minors' Claims. That Petition was granted and the Order reflecting this was entered on August 2, 2016. A defendant is not required to settle with all plaintiffs/nominal defendants. Furthermore, a settlement which does not include the nominal defendant means that the nominal defendant has no right to a share of the settlement. (*Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691, 699.) But when a defendant settles with less than all wrongful death claimants, it waives the right conferred by the "one action rule" to face only a single wrongful death action. The non-settling heirs may continue to pursue the action against the defendants, "even if the non-settling heirs are nominally defendants in the case." (*Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691, 698.) Thus, the action continued as to Mr. Alvarez, despite the settlement with plaintiffs, and CCFMG's motion, while moot as to plaintiffs, applies to Mr. Alvarez. Defendant Abbott's joint motion applies to both plaintiffs and Mr. Alvarez.

Said defendants are entitled to summary judgment. No party has opposed their motion. No party has offered any expert testimony to controvert the expert declaration of Nancy Robinson, R.N., N.P. who concluded that said defendants complied with the standard of care in their care and treatment of the decedent Lisa Alvarez, and did not cause or contribute to her injuries or harm. No party has offered any expert testimony to controvert the expert declaration of pulmonologist and critical care physician James Hershon, MD., who concluded that no act or failure to act on the part of said defendants was a substantial factor in causing or contributing to the injury and harm of Lisa Alvarez. Therefore, there is no triable issue of material fact on an essential element of plaintiffs' claim, so summary judgment is appropriate.

Motion by Defendant CRMC:

Defendant CRMC is entitled to summary judgment. No party has opposed its motion. No party has offered any expert testimony to controvert the expert declaration of Michael J. Bresler, M.D., FACEP, who concluded that CRMC and its personnel complied with the standard of care in their care and treatment of the decedent Lisa Alvarez, and did not cause or contribute to her injuries or harm, and that CRMC complied with the terms of its bylaws, rules, regulations, and policies regarding the initial granting and periodic review of the competence of all of the staff physicians who rendered care to Lisa Alvarez at its facility. No party has controverted defendants' assertion that CRMC has never employed any of Lisa Alvarez' treating physicians or residents. Therefore, there is no triable issue of material fact on an essential element of plaintiffs' claim, so summary judgment is appropriate.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

### Tentative Ruling

Issued By: JYH on 08/24/16.  
(Judge's initials) (Date)

## **Tentative Rulings for Department 403**

(30)

Re: ***Victoria Montufar v. Fresno Metropolitan Flood Control District***  
Superior Court No. 16CECG00721

Hearing Date: Thursday August 25, 2016 (**Dept. 403**)

Motion: (1) Defendant Fresno Metropolitan Flood Control District's  
Motion to Strike

### **Tentative Ruling:**

To Grant motions to strike: paragraph 39 (request 6); paragraph 50 (request 7); and line 19 of page 13 (request 12).

To Order requests: 9 (p13, ln13); 10 (p13, ln14); and 11 (p13, 16) off calendar.

To Deny all other requests.

Plaintiffs are granted 10 days leave to amend. The time in which an amended pleading may be filed will run from service by the clerk of the minute order.

### **Explanation:**

#### Cause of Action 1: Dangerous Condition of Public Property

Public entities may be held liable as a result of dangerous conditions of public property, for injuries to the same kind of interests that apply in actions between private persons including emotional distress. (Gov. Code § 810.8; *Delta Farms Reclamation Dist. v. Sup.Ct.* (Fernandez) (1983) 33 Cal.3d 699, 711.)

1. Paragraph 18 (p 6, lns 10-11): Dangerous condition of public property allows emotional distress damages. Motion denied.

2. Paragraph 24 (p7, lns 16-22): Dangerous condition of public property allows compensatory (including emotional) damages. Motion denied.

#### Cause of Action 2: Nuisance

Public entities may be held liable under a nuisance theory, for damages as well as injunctive relief. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 935; *Vedder v. Imperial* (1974) 36 Cal.App.3d 654, 661; *Buchanan v. Los Angeles County Flood Control Dist.* (1976) 56 Cal.App.3d 757, 768; *Paterno v. California* (1999) 74 Cal.App.4th 68; Civ. Code § 3479.)

In nuisance, a plaintiff may recover for all personal injury (including emotional distress) and property damage caused by defendant's unlawful acts or omissions. (Civ. Code §§ 3281-3283, 3333; *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 272; *City of*

*San Jose v. Superior Court* (1974) 12 Cal.3d 447; *Acadia, California, Limited v. Herbert*, (1960) 54 Cal.2d 328; *Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036; *Lew v. Superior Court* (1993) 20 Cal.App.4th 866; *Smart v. City of Los Angeles* (1980) 112 Cal.App.3d 232.) Additionally, physical injury is not a prerequisite to recovery. (*Acadia, supra*, 54 Cal.2d 328.)

3. Paragraph 31 (p9, Ins 1-5): Nuisance allows compensatory (including emotional) damages. Motion denied.

4. Paragraph 32 (p9, Ins 1-5): No damages are being requested here. Motion denied.

#### Cause of Action 3: Trespass to Chattels

Plaintiff may recover for emotional distress when asserting trespass to chattels, as a result of injury to a dog. (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1605-1607.)

5. Paragraph 37 (p10, Ins 8-14): Trespass to chattels -regarding dogs- allows emotional distress damages. Motion denied.

#### Code of Civil Procedure section 430.10(e)

Failure to state facts sufficient to state a cause of action is ground for general demurrer, not for a Code of Civil Procedure section 436 motion to strike. (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 529.)

A motion to strike cannot be used to challenge the veracity of Plaintiff's assertions regarding intent (as per Defendant FMFCD's Memo, e-filed: 7/13/16, p6 ln28).

#### Punitive Damages

Punitive damages are not recoverable against a public entity. (Gov. Code § 818.)

6. Paragraph 39 (p10, Ins 19-21): Punitive damages are not recoverable against Defendant Fresno Metropolitan Flood Control District ("FMFCD") because it is a public entity. Motion granted as it relates to Defendant FMFCD.

#### Cause of Action 5: Negligence Per Se

Plaintiff may recover for all harm proximately caused by defendant's wrongful acts. (Civ. Code §§ 3281-3282, 3333.) However, if the *only* injury caused by defendant's negligence is emotional distress, damages are available *only* if Plaintiff asserts negligent infliction of emotional distress (NIED). (*Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc.* (1989) 48 Cal.3d 583, 588.)

7. Paragraph 50 (p12, Ins 9-15): Here, the only injuries Plaintiffs suffered were emotional, but Plaintiffs cannot assert NIED because Fresno County Ordinance 9.04.250 does not impose a duty on Defendant FMFCD. Motion granted as it relates to Defendant FMFCD.

#### Prayer

8. Page 12, line 26: Dangerous conditions of public property permits emotional distress (see above). Motion denied.

8a. Page 13, line 5: Nuisance permits emotional distress (see above). Motion denied.

9. Page 13, line 8: Trespass to chattels allows compensation for all actual damages attributable to the property's impairment or lost use. (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551.) Motion denied.

9a. Page 13, line 13: Plaintiff is not seeking damages against Defendant FMFCD; motion regarding cause of action four is denied. Motion regarding cause of action five is ordered off calendar; issue eliminated (see #7 above).

10. Page 13, line 9: Trespass to chattels allows for emotional distress damages (see above). Motion denied.

10a. Page 13, line 14: Plaintiff is not seeking damages against Defendant FMFCD; motion regarding cause of action four is denied. Motion regarding cause of action five is ordered off calendar; issue eliminated (see #7 above).

11. Page 13, line 16: Plaintiff is not seeking damages against Defendant FMFCD; motion regarding cause of action four is denied. Motion regarding cause of action five is ordered off calendar; issue eliminated (see #7 above).

12. Page 13, line 19: There is no statutory provision for attorneys' fees. (Code Civ. Proc., § 1021; *Viner v. Untrecht* (1945) 26 Cal.2d 261, 272; *Pederson v. Kennedy* (1982) 128 Cal.App.3d 976, 979.) Motion granted concerning causes of action one, two, and three, as they affect Defendant FMFCD.

#### Emotional Distress Damages

Defendant FMFCD cites several cases to support the assertion that Plaintiffs are not entitled to emotional distress damages, but none of the cases Defendant FMFCD cites are applicable:

*Martinez v. Robledo* (2012) 210 Cal.App.4th 384 and *McMahon v. Craig* (2009) 176 Cal.App.4th 1502 apply to negligence and conversion, neither of which are being asserted here.

*Johnson v. McConnell* (1889) 80 Cal. 545 holds that a dog is considered personal property for valuation purposes. It has no bearing on This Court's authority to award emotional distress damages based on the causes of action herein asserted.

*Zaslow v. Kroenert* (1946) 29 Cal.2d 541 applies to trespass to chattels when Defendant's conduct does not amount to a substantial interference with possession. Here, Plaintiff's dog was killed, so this case is not applicable.

*Cooper v. Superior Court* (1984) 153 Cal.App.3d 1008 and *Lubner v. City of Los Angeles* (1996) 45 Cal.App.4th 525 apply to negligent infliction of emotional distress, which is not being asserted here.

*Erlach v. Menezes* (1999) 21 Cal.4th 543 applies to torts when they arise from breach of contract, not the situation here.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By:**     KCK     on 08/24/16.  
                    (Judge's initials)           (Date)

**Tentative Ruling**

Re: **Rogers v. Vestal**  
Case No. 14 CE CG 02861

Hearing Date: August 25<sup>th</sup>, 2016 (Dept. 403)

Motion: Defendants' Motion for Sanctions against Plaintiff for Failure to Appear for her Physical Examination

**Tentative Ruling:**

To grant the defendants' motion for sanctions against plaintiff for her failure to appear for her physical examination. (Code Civ. Proc. § 2032.410.) If no hearing is necessary, sanctions will be \$1,210. If a hearing is necessary and plaintiff fails to show that sanctions are not warranted, plaintiff will be ordered to pay sanctions of \$1,446. Plaintiff shall pay sanctions within 30 days of the date of service of this order.

**Explanation:**

Code of Civil Procedure section 2032.410 authorizes monetary or other sanctions against a party who fails to attend their physical examination. In the present case, plaintiff was required to submit to a physical examination under section 2032.220, as she is claiming personal injuries from a car accident. However, she failed to attend the examination without first serving a written objection, as required by section 2032.230. While plaintiff has claimed that she refused to go to the examination because she had seen Dr. Miller before and he was rude to her, she did not timely object to being examined by him within 20 days of the examination, so she had no right to unilaterally refuse to be examined. Therefore, the court intends to find that the plaintiff's failure to appear for her examination was unjustified, and it will impose monetary sanctions against her.

Defendant seeks \$1,446.00 in sanctions, primarily based on the \$1,000 "no-show" fee that Dr. Miller charged defendant for plaintiff's non-appearance. While the no-show fee is fairly high, it appears to be consistent with what other doctors in the area charge. There is no reason why defendant should have to pay this fee when plaintiff failed to appear for her examination without serving a response or making an objection prior to the examination. Therefore, the court intends to order plaintiff to pay for the no-show fee, as well as the filing fee and attorney's fees for bringing the motion, for a total of \$1,210. If a hearing is required and plaintiff fails to show that sanctions are not warranted, the court will also impose sanctions to compensate defendant for the Court Calls fees of \$86 and the attorney time spent arguing the motion, for a total of \$1,446.

Pursuant to CRC 3.1312 and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By:**     **KCK**     **on 08/24/16.**  
                    (Judge's initials)        (Date)

(2)

**Tentative Ruling**

Re: ***Lewis et al. v. Waller***  
Superior Court Case No. 16CECG00651

Hearing Date: August 25, 2016 (Dept. 403)

Motion: Petition to Compromise Minor's Claim

**Tentative Ruling:**

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

Issued By:     KCK     on 08/24/16.  
                    (Judge's initials)      (Date)

(28)

**Tentative Ruling**

Re: **Allison v. MUFG Union Bank, N.A.**

Case No. 16CECG00691

Hearing Date: August 25, 2016 (Dept. 403)

Motion: By Plaintiffs for Default Judgment Against "The Heirs or Devisees of Thomas W. Tucker; and All Persons Unknown Claiming Any Legal or Equitable Right, Title, Estate, Lien or Interest in the Property Described in the Complaint Adverse to Plaintiff.

**Tentative Ruling:**

To deny the request for entry of default judgment.

The Court will vacate the default entered on May 27, 2016.

**Explanation:**

The Complaint in this case seeks to quiet title on the basis of adverse possession. The Complaint was served by publication and listed as defendants "[t]he Heirs or Devisees of Thomas W. Tucker; and All Persons Unknown Claiming Any Legal or Equitable Right, Title, Estate, Lien or Interest in the Property Described in the Complaint Adverse to Plaintiff." The Complaint alleged that Thomas W. Tucker had passed away. No answer was filed and Default was entered by the Court on May 27, 2016.

In the declaration in support of the Default filed on July 26, 2016, counsel for Plaintiffs declared that he had located the stepson of Mr. Tucker and that this potential heir "is not interested in pursuing any claim as to the property and has not answered the Complaint." (Declaration of Jones ¶13.)

However, this stepson, whose identity is apparently known to plaintiffs, was not listed in item 6 of the Request for Default form which requires a copy of the form to be mailed to each defendant. For this reason alone the Request for Default Judgment is denied.

Furthermore, the declaration submitted by Plaintiffs does not indicate when Plaintiffs became aware of the stepson's existence. Therefore, it is unclear if Plaintiff has complied with Code of Civil Procedure §415.50, subdivision (b) or if the potential heir's location was actually ascertainable prior to resorting to the use of service by publication (*Watts v. Crawford* (1995) 10 Cal.4th 743, 749 ("constitutional principles of

due process of law, as well as the authorizing statute, require that service by publication be utilized only as a last resort")). In such circumstances, the potential heir should have been served by some method other than publication.

As a result, unless Plaintiffs can present evidence that the service by publication was proper, the Court will vacate the default.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By:**     KCK     **on 08/24/16.**  
                    (Judge's initials)           (Date)

(5)

**Tentative Ruling**

Re: **Thomas A. Glaski v. Bank of America et al.**  
Case No. 09 CECG 03601

Hearing Date: August 25, 2016 **(Dept. 403)**

Motion: Summary Judgment, or in the alternative, summary adjudication by the Defendants

**Tentative Ruling:**

To request further briefing by the parties on the issue as stated infra. Simultaneous supplemental briefs will be filed no later than September 2, 2016. Service on the opposing party will be via fax, electronic service or hand delivery. The hearing will be continued to September 15, 2016 at 3:30 p.m. in Dept. 403.

**Explanation:**

The Appellate Decision

In *Glaski v. Bank of America, National Association* (2013) 218 Cal.App.4th 1079, the Fifth District Court of Appeal addressed “whether a postclosing date transfer into a securitized trust is the type of defect that would render the transfer void.” The appellate court determined that the WaMu Securitized Trust is governed by New York law. *Glaski v. Bank of America, National Association*, supra, 218 Cal.App.4th at 1096. The court acknowledged a split of authority regarding whether an act in contravention of the trust instrument is void or voidable. It stated:

We are aware that some courts have considered the role of New York law and rejected the postclosing date theory on the grounds that the New York statute is not interpreted literally, but treats acts in contravention of the trust instrument as merely voidable. (*Calderon v. Bank of America, N.A.* (W.D.Tex., Apr. 23, 2013, No. SA:12-CV-00121-DAE) 941 F.Supp.2d 753, 767, [2013 WL 1741951, at p. \*12] [transfer of plaintiffs' note, if it violated a pooling and servicing agreement, would merely be voidable and therefore \*1097 plaintiffs do not have standing to challenge it]; *Bank of America National Association v. Bassman FBT, L.L.C.* (Ill.Ct.App.2012) 366 Ill.Dec. 936, 981 N.E.2d 1, 8 [following cases that treat *ultra vires* acts as merely voidable].)

*Id.* at 1096–97

However, after an examination of various decisions and a treatise, the court further stated:

Because the literal interpretation furthers the statutory purpose, we join the position stated by a New York court approximately two months ago: "Under New York Trust Law, every sale, conveyance or other act of the trustee in contravention of the trust is void. EPTL § 7-2.4. Therefore, the acceptance of the note and mortgage by the trustee after the date the trust closed, would be void." (*Wells Fargo Bank, N.A. v. Erobobo* (Apr. 29, 2013) 39 Misc.3d 1220(A), 2013 WL 1831799, slip opn. p. 8; see Levitin & Twomey, *Mortgage Servicing*, *supra*, 28 Yale J. on Reg. at p. 14, fn. 35 [under N.Y. law, any transfer to the trust in contravention of the trust documents is void].) Relying on *Erobobo*, a bankruptcy court recently concluded "that under New York law, assignment of the Saldivas' Note after the start up day is void *ab initio*. As such, none of the Saldivas' claims will be dismissed for lack of standing." (*In re Saldivar* (Bankr.S.D.Tex., Jun. 5, 2013, No. 11-10689) 2013 WL 2452699, at p. \*4.)

*Id.* at 1097.

### Doctrine of Law of the Case

According to 9 Witkin California Procedure (5th Ed. 2008) "Appeal" § 459:

If a case is first tried, and the judgment rendered is reversed on appeal, it will ordinarily be tried again (except where the reversal is with directions to enter judgment). And after retrial (and in some situations after a judgment is entered pursuant to directions), another appeal may be taken. The doctrine of "law of the case" deals with the effect of the first appellate decision on the subsequent retrial or appeal. The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.

*Id.* citing inter alia *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.298 at 309.

But, later California decisions view the doctrine as one of policy only, to be disregarded when compelling circumstances call for a redetermination of the point of law determined on a prior appeal. At this time, there is no "test" per se. Various cases hold that the doctrine will not be invoked to accomplish injustice. (See *England v. Hospital of the Good Samaritan* (1939) 14 Cal.2d 791, 795; *People v. Medina* (1972) 6 Cal.3d 484, 492 [contrary to policy and purpose of statute]; *Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 435; *Salazar v. Eastin* (1995) 9 Cal.4th 836, 859 [doctrine not followed "where its application will result in an unjust decision"]; *Ryan v. Mike-Ron Corp.* (1968) 259 Cal.App.2d 91, 96; *Daar & Newman v. VRL Int.* (2005) 129 Cal.App.4th 482, 487.)

## What is Controlling New York Law?

It is important to note that Glaski cited relied upon the decision of *Wells Fargo Bank, N.A. v. Erobobo*, supra. It was rendered by the Supreme Court of the State of New York. Counter-intuitive to its name, this is the **trial-level court** of general jurisdiction in the New York State Unified Court System. The highest court of the State of New York is the Court of Appeals. See State of New York Judiciary Budget: FY 2014-15, p. 18.

“When a question arises in the courts of this state as to the construction or effect of a statute of another state, our courts will follow the interpretation placed upon such statute by the court of **last resort** of the enacting state.” (*Jones v. Jones* (1960) 182 Cal.App.2d 80, 83, 88, see 20 Am.Jur.2d (2005 ed.)) (Cf. *Gough v. Gough* (1950) 101 Cal.App.2d 262, 267, 225 P.2d 668 [New York decisions found contradictory; following view of New York Law Revision Commission and prior California cases].)

Although the court of “last resort” (the Court of Appeals) of the state of New York has yet to address this issue, some decisions of the intermediate appellate courts have held that an act in contravention of a trust is voidable not void given that a beneficiary can ratify the trustee’s ultra vires act. See *Mooney v. Madden*, 193 A.D.2d 933, 597 N.Y.S.2d 775, 776 (1993); *Leasing Serv. Corp. v. Vita Italian Rest., Inc.*, 171 A.D.2d 926, 927, 566 N.Y.S.2d 796, 797 (1991); *Hine v. Huntington*, 118 A.D. 585, 592, 103 N.Y.S. 535, 540 (1907); *In re Levy*, 69 A.D.3d 630, 632, 893 N.Y.S.2d 142, 144 (2010).

Therefore, the Court requests further briefing on the issues of whether the “law of the case” doctrine must be followed and, if not, whether under the decisions of the intermediate appellate courts of New York state, the alleged acceptance of the note and mortgage by the trustee of the WaMu Securitized Trust after the closing date is voidable rather than void such that the beneficiary could ratify the transfer rendering it valid. If so, then the result would be that the Plaintiff would lack standing to challenge the transfer. See *Yvanova v. New Century Mortgage Corporation* (2016) 62 Cal.4th 919 at 930-931.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

### **Tentative Ruling**

Issued By:     KCK     on 08/24/16.  
                    (Judge’s initials)           (Date)

# **Tentative Rulings for Department 501**

(20)

## **Tentative Ruling**

Re: **Rogers v. Rogers**  
Superior Court Case No. 15CECG00464

Hearing Date: **August 25, 2016 (Dept. 501)**

Motions: (1) Motion to Compel Responses to Interrogatories and Requests for Production of Documents and for Sanctions;  
(2) Motion for Sanctions Pursuant to Code Civ. Proc. § 128.7

### **Tentative Ruling:**

To grant the motion to compel. Within 10 days of service of the order by the clerk, defendant shall serve responses to Form Interrogatories, Set One, and Request for Production of Documents, Set One. (Code Civ. Proc. §§ 2030.290, 3031.300.) Objections are not waived. No sanctions will be awarded.

To deny the motion for sanctions. (Code Civ. Proc. § 128.7.)

### **Explanation:**

#### **Motion to Compel**

The court cannot determine on this record whether the discovery was actually served and/or received due to the conflicting claims of the attorneys. There will be no prejudice to defendant by requiring her to serve responses, and no undue benefit to plaintiff if objections are not deemed waived and sanctions are not imposed. In the future, as a practical matter, plaintiff's counsel should retain copies of signed proofs of service in order to avoid situations like this.

#### **Motion for Sanctions**

Defendant essentially treats this sanctions motion as one for summary judgment, but without satisfying the notice procedural requirements for such a motion, or even establishing that overall, the Complaint lacks merit.

Sanctions under Code Civ. Proc. § 128.7 should be "made with restraint" (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 448), and the court prefers to see parties pursue other means for making dispositive motions before going straight for sanctions under section 128.7.

As the opposition points out, the notice of motion is deficient. It does not clearly state what sanctions are sought, against whom the sanctions are sought, or the grounds for the sanctions. Accordingly, the notice of motion fails to comply with Code Civ. Proc. § 110 and Cal. Rules of Court, Rule 3.1110(a). (See Weil & Brown, *Cal. Practice Guide: Civ. Proc. Before Trial* (TRG 2016) ¶¶ 9:40, 9:1189.5; *Cromwell v. Cummings* (1998) 65 Cal.App.4th Supp. 10, 13.) The motion is denied on this ground alone.

Moreover, the motion cherry-picks certain allegations from the Complaint (paragraphs 6, 7, 8, 9, 13, 18, 21, 24, 25, 27, 30 and 33) contending they are not supported by plaintiff's deposition testimony, while ignoring many others (paragraphs 4, 5, 10, 11, 12, 14, 15, 16, 17, 19, 20, 22, 23, 26, 28, 29, 31 and 32). Even if the allegations addressed in the moving papers are not supported by the evidence, that does not mean that the Complaint as a whole is frivolous or lacks evidentiary support. The court would expect such a showing to be made in a motion seeking terminating sanctions. The motion also fails to consider that evidence other than plaintiff's testimony may support the challenged allegations.

Even if defendant had conclusively shown that the allegations challenged lack evidentiary support, the court would exercise its discretion in this case to deny sanctions. Sanctions under section 128.7 are discretionary. The court is not required to impose a monetary sanction or any sanction at all. (See Code Civ. Proc. § 128.7(c); see *Kojababian v. Genuine Home Loans, Inc.* (2009) 174 Cal.App.4th 408, 421.)

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By:**     MWS     **on 08/24/16.**  
                    (Judge's initials)      (Date)

(20)

**Tentative Ruling**

Re: ***Switzer v. Flournoy Management, LLC, et al.***, Superior Court  
Case No. 11CECG04395

Hearing Date: **August 25, 2016 (Dept. 501)**

Motion: (1) Switzer's Motion to Compel Further Responses to Form Interrogatories Set Two  
(2) Switzer's Motion to Compel Further Responses to Request for Production of Documents, Set Two  
(3) Switzer's Motion to Compel Further Responses to Special Interrogatories, Set Three

**Tentative Ruling:**

To grant Switzer's motion to compel further response to Form Interrogatories, Set Two, Nos. 50.1, 50.2, 50.3, 50.4, 50.5 and 50.6. Cross-defendants McCormick, Barstow, Sheppard, Wayte & Carruth, LLP, Gordon Park, Dana Denno and Irene Fitzgerald (collectively, "McCormick") shall serve further verified responses to the interrogatories within 20 days of service of the order by the clerk. (Code Civ. Proc. § 2030.300(c).)

To deny the motions to compel further responses to Request for Production of Documents, Set Two, and Special Interrogatories, Set Three. (Code Civ. Proc. §§ 2030.300(c), 2031.310(a).)

**Explanation:**

**Form Interrogatories**

The form interrogatories at issue seek information about "agreements alleged in the pleadings," (50.1) including information about breach (50.2), performance (50.3), termination (50.4), enforceability (50.5) and ambiguity (50.6) thereof.

McCormick objected that the interrogatories are vague, ambiguous, overbroad, burdensome and oppressive, as there are no contract claims alleged in Switzer's cross-complaint. However, Switzer pointed out in his meet and confer letter that McCormick's answer is a pleading (see Code Civ. Proc. § 422.10), and the 14<sup>th</sup> affirmative defense thereof alleges an agreement. The discovery was aimed at information pertaining to that affirmative defense. Despite that clarification, McCormick still have refused to provide a substantive response.

McCormick also object on grounds of attorney-client privilege and attorney work product doctrine. To a certain extent, since McCormick rely on this agreement (apparently a retainer or fee agreement) as an affirmative defense, the privilege has been waived. While Flournoy is the holder of the privilege, it has not objected to McCormick's disclosure thereof, though it is a represented party in this litigation. (See

Evid. Code § 912(a) ["the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), ... is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone."]) Waiver by consent to disclosure of otherwise privileged material "is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." (*Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 112, quoting *Calvert v. State Bar* (1991) 54 Cal.3d 765, 780.)

Moreover, the opposition fails to address these objections in the context of any of the particular interrogatories. It is McCormick's burden to substantiate the objections. (*D.L. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 729.) No factual information is provided to make a showing that disclosure of the information requested would necessarily reveal privileged or confidential information. Accordingly, the motion should be granted.

### **Special Interrogatories**

Swifter moves to compel further responses to special interrogatories 26-35 propounded on McCormick Barstow firm, and 20-29 propounded on the individual McCormick attorney cross-defendants.

In response to interrogatory no. 6, McCormick contended that their concurrent representation of Fournoy and Wood did not violate Rules of Professional Conduct, Rule 3-310(c)(1) regarding representation of multiple clients with potentially conflicting interests because the interests of Fournoy and Wood were not in conflict. Switzer followed that up with a second set of special interrogatories (no. 24 propounded in McCormick Barstow, and no. 18 propounded on the individual defendants) asking for "every fact" supporting the contention that there was no potential conflict of interest between Fournoy and Wood before 3/12/12.

McCormick responded with nine brief factual statements. Instead of moving to compel further factual from the set two interrogatories, Switzer propounded a third set of interrogatories seeking more factual detail and information pertaining to three of the nine facts stated in the set two interrogatories.

A party has 45 days from service of the response to move for an order compelling a further response if the response is deemed incomplete or evasive. (Code Civ. Proc. § 2030.300.) The responses to Set Two were served on 12/22/15. Clearly such a motion would be untimely. Switzer failed to file such a motion to compel a more complete response. Instead, after the time had lapsed to do so, Switzer propounded more interrogatories seeking more detail about the responses previously provided.

In set three, interrogatory nos. 26, 29, 32 (propounded on McCormick Barstow) and nos. 20, 23, 26 (propounded on individual attorney defendants) sought more factual detail of the facts stated in response to interrogatories 24 and 18. These interrogatories are an apparent attempt to circumvent the deadline for filing a motion

to compel further responses to the set two interrogatories. If insufficient factual information was provided, then Switzer should have moved for an order compelling a full response.

The other set three interrogatories refer back to and are dependent on interrogatories 26, 29, 32 (McCormick Barstow) and 20, 23, 26 (individual attorney defendants) for which further responses should be denied. (I.e., no. 27 to McCormick Barstow asks, for each fact described in response to no. 26, identify all writings supporting the existence of that fact. No. 28 is similar, seeking identification and contact information of persons having knowledge of that fact). Since no response is being ordered as to the predicate interrogatories, the follow-up interrogatories are rendered moot.

## Inspection Demands

Switzer moves to compel further responses to document demand nos. 26-28, which ask McCormick to produce all writings identified in McCormick's responses to Special Interrogatories Set Three, nos. 27, 30 and 35. In light of ruling on the special interrogatories, this motion should be denied as well.

No sanctions will be awarded in connection with any of these motions, in light of the mixed results.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

## Tentative Ruling

Issued By: MWS on 08/24/16.  
(Judge's initials) (Date)

### Tentative Ruling

Court Case No. 15CECG02413

**August 25, 2016 (Dept. 403)**

Motion to Enforce Settlement Agreement and for Entry of Judgment

### Tentative Ruling:

To grant the motion to enforce settlement and enter judgment against defendant pursuant to the settlement agreement. Plaintiff is directed to submit to this court, within 10 days of service of the minute order, a proposed judgment consistent with the settlement agreement.

**Explanation:**

In pertinent part, Code of Civil Procedure Section 664.6 provides as follows: "If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court . . . for settlement of the case . . . the court, upon motion, may enter judgment pursuant to the terms of the settlement."

Here, plaintiffs and defendant David Nino Farms Marketing Group, Inc. have a writing, signed by them outside the presence of the court, and litigation is still pending (i.e., no dismissal of the settling defendants has yet been filed). Therefore entry of judgment pursuant to Section 664.6 is proper. The amount of judgment sought is proper pursuant to the terms of the "Settlement and Release Agreement" and as proven by the declaration of plaintiff's counsel.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

## Tentative Ruling

Issued By: MWS on 08/24/16.  
(Judge's initials) (Date)

(23)

**Tentative Ruling**

Re: ***Abelardo Suarez v. Beverly Healthcare – California, Inc.***  
Superior Court Case No. 16CECG00473

Hearing Date: Thursday, August 25, 2016 (**Dept. 501**)

Motion: Defendants Beverly Healthcare – California, Inc.'s, Beverly Health and Rehabilitation Services, Inc.'s, Beverly Enterprises, Inc.'s, GGNSC Clinical Services, LLC's, and GGNSC Administrative Services, LLC's Petition to Compel Arbitration

**Tentative Ruling:**

To grant Defendants Beverly Healthcare – California, Inc.'s, Beverly Health and Rehabilitation Services, Inc.'s, Beverly Enterprises, Inc.'s, GGNSC Clinical Services, LLC's, and GGNSC Administrative Services, LLC's petition to compel arbitration of the claims brought by Plaintiff Abelardo Suarez, by and through his successor in interest, Sonia Hernandez. (9 U.S.C. § 4.)

To deny Defendants Beverly Healthcare – California, Inc.'s, Beverly Health and Rehabilitation Services, Inc.'s, Beverly Enterprises, Inc.'s, GGNSC Clinical Services, LLC's, and GGNSC Administrative Services, LLC's petition to compel arbitration of Plaintiff Sonia Hernandez's wrongful death claim.

To stay the entire action pending resolution of the arbitration proceedings or until further order of this Court. (9 U.S.C. § 3; Code Civ. Proc., § 1281.4.)

**Explanation:**

Defendants Beverly Healthcare – California, Inc. dba Golden Living Center – Fresno, Beverly Health and Rehabilitation Services, Inc., Beverly Enterprises, Inc., GGNSC Clinical Services, LLC, and GGNSC Administrative Services, LLC ("Defendants") petition this Court for an order compelling Plaintiffs Abelardo Suarez, by and through his successor in interest, Sonia Hernandez, and Sonia Hernandez, individually ("Plaintiffs") to submit the claims raised in this action to alternative dispute resolution pursuant to the agreement executed by Abelardo Suarez on December 22, 2014 and the Federal Arbitration Act. Additionally, Defendants request that the Court order this action stayed pursuant to 9 U.S.C. section 3 and Code of Civil Procedure section 1281.4 until the alternative dispute resolution process is completed.

**Petition to Compel Arbitration**

"Under both federal and state law, arbitration agreements are valid and enforceable, unless they are revocable for reasons under state law that would render any contract revocable. [Citations.] Reasons that would render any contract revocable under state law include fraud, duress, and unconscionability. [Citations.] [¶]"

A motion to compel arbitration is essentially a request for specific performance of a contractual agreement. [Citation.] The party seeking to compel arbitration bears the burden of proving by a preponderance of the evidence the existence of an arbitration agreement. [Citations.] The party opposing the petition bears the burden of establishing a defense to the agreement's enforcement by a preponderance of the evidence. [Citations.] In determining whether there is a duty to arbitrate, the trial court must, at least to some extent, examine and construe the agreement." (*Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 239.)

Therefore, first, Defendants must prove the existence of an arbitration agreement by a preponderance of the evidence. In this case, Defendants have presented the Court with a "CALIFORNIA ALTERNATIVE DISPUTE RESOLUTION AGREEMENT." (Notice of Lodgment of Exhibits in Support of Petition to Compel Arbitration, Exhibit 1, California Alternative Dispute Resolution Agreement, and Exhibit 16, Declaration of Norma Ramos, ¶¶ 3-4.) The written agreement provides that the "Alternative Dispute Resolution Agreement ... is entered into by Golden Living Center Fresno and Abelardo Suarez" and that "Facility and Resident [agree] that any and all claims, disputes, and controversies ... arising out of, or in connection with, or relating in any way to the Admission Agreement, any service or health care provided by the Facility to the Resident, and/or any claim about the validity, interpretation, construction, performance, and enforcement of this Agreement shall be resolved exclusively by binding arbitration brought only on behalf of the Resident[.]" (Notice of Lodgment of Exhibits, Exhibit 1, p. 1, Articles 1 & 2.) The arbitration agreement was signed on December 23, 2014 by Abelardo Suarez. (Notice of Lodgment of Exhibits, Exhibit 1, p. 4.) Therefore, Defendants have proven the existence of an arbitration agreement by a preponderance of the evidence.

Second, Plaintiffs contend that the Court should refuse to enforce the arbitration agreement because Abelardo Suarez lacked competency when he purportedly entered into the agreement, Plaintiff Sonia Hernandez's individual wrongful death claim is not subject to arbitration, and the arbitration agreement is against public policy. However, Defendants argue that the Court only has jurisdiction to consider Plaintiffs' lack of competency defense because the arbitration agreement contains a delegation clause.

"Under the Federal Arbitration Act ..., the enforceability of an arbitration agreement is normally determined by the court." (*Cobarruviaz v. Maplebear, Inc.* (N.D. Cal. 2015) 143 F.Supp.3d 930, 939.) However, "[p]arties to an arbitration agreement may agree to delegate to the arbitrator, instead of a court, questions regarding the enforceability of the agreement." (*Tiri v. Lucky Chances, Inc.*, *supra*, 226 Cal.App.4th 231, 241.) Defendants are correct that the written arbitration agreement contains a delegation clause. (Notice of Lodgment of Exhibits, Exhibit 1, p. 1, Article 2.) However, "[t]here are two prerequisites for a delegation clause to be effective. First, the language of the clause must be clear and unmistakable. [Citation.] Second, the delegation must not be revocable under state contract defenses such as fraud, duress, or unconscionability." "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally ... should apply ordinary state-

law principles that govern the formation of contracts." (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944.)

Article 2 of the written arbitration agreement provides that "[i]t is ... agreed by Facility and Resident that ... any claim about the validity, interpretation, construction, performance, and enforcement of this Agreement shall be resolved exclusively by binding arbitration[.]" (Notice of Lodgment of Exhibits, Exhibit 1, p. 1, Article 2.) While this delegation clause is unambiguous and clear on its face, the delegation clause is made uncertain and unclear by severability clauses in Articles 4 and 8 of the agreement. In Article 4, the agreement states that: "In the event a court having jurisdiction finds any portion of this Agreement unenforceable, that portion shall not be effective and the remainder of the Agreement shall remain effective." (Notice of Lodgment of Exhibits, Exhibit 1, p. 2, Article 4.) Further, in Article 8, the agreement provides that: "If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or enforceable [*sic*] in whole in in part, the remainder of this Agreement, including all valid and enforceable parts of the provision in question, shall remain valid, enforceable, and binding on the parties." Due to the fact that the severability clauses acknowledge the possibility that a court might decide disputes over the interpretation and enforceability of the written arbitration agreement, the written arbitration agreement does not clearly and unmistakably delegation enforceability questions to the arbitrator. (*Cobarruviaz v. Maplebear, Inc.*, *supra*, 143 F.Supp.3d 930, 939-941; *Mohamed v. Uber Technologies, Inc.* (N.D. Cal. 2015) 109 F.Supp.3d 1185, 1199-1204.)

Therefore, since the arbitration agreement does not clearly and unmistakably delegate the authority to decide the enforceability of the agreement to the arbitrator, the delegation clause is ineffective and cannot itself be enforced. Accordingly, the Court now considers the merits of Plaintiffs' arguments why the arbitration agreement should not be enforced.

First, Plaintiffs contend that the Court should refuse to enforce the arbitration agreement because Abelardo Suarez lacked mental competency when he purportedly entered into the agreement. More specifically, Plaintiffs argue that Mr. Suarez was incapable of entering into a valid and enforceable contract because he had numerous significant medical conditions and was taking multiple mood altering medications when he signed the agreement. In support of their argument, Plaintiffs submit the declaration of Plaintiff Sonia Hernandez, who states that her father, Mr. Suarez, had significant health issues and was on a lot of medications when he signed the arbitration agreement, and declares that she can tell that Mr. Suarez lacked capacity because the signature on the agreement "does not even look like his signature." (Declaration of Sonia Hernandez in Support of Plaintiffs' Opposition, ¶¶ 5-6.)

People are presumed to be competent to make decisions. (Prob. Code, § 801, subd. (a).) The fact that a person has a mental or physical disorder is not dispositive on the issue of capacity. (Prob. Code, § 801, subd. (b).) Provided that a decisionmaker has the ability to communicate his or her decision verbally, or by any other means, and to understand: (1) the rights, duties, and responsibilities created by, or affected by the decision; (2) the probable consequences for the decisionmaker and, where

appropriate, the persons affected by the decision; and (3) the significant risks, benefits, and reasonable alternatives involved in the decision, the decisionmaker has capacity. (Prob. Code, § 812.) Here, Plaintiffs' evidence consists only of Abelardo Suarez's medical records and Plaintiff Sonia Hernandez's declaration tending to establish that Mr. Suarez suffered from numerous medical conditions and took several mood altering drugs and that his signature on the arbitration agreement did not look like his usual signature. However, none of Plaintiffs' evidence addresses how Mr. Suarez's ability to communicate and understand the nature of his decisions. As such, Plaintiffs' evidence fails to rebut the presumption that Mr. Suarez was competent to enter into the arbitration agreement.

Second, Plaintiffs argue that the Court should deny Defendants' petition to compel arbitration pursuant to Code of Civil Procedure section 1281.2, subdivision (c), because Plaintiff Sonia Hernandez's individual wrongful death claim is not subject to arbitration because she did not sign the arbitration agreement. On the other hand, initially, Defendants contend that Plaintiff Sonia Hernandez's individual wrongful death claim is subject to arbitration under the reasoning of *Ruiz v. Podolsky* (2010) 50 Cal.4th 838.

In *Ruiz v. Podolsky*, the California Supreme Court held that nonsignatories to an arbitration agreement must arbitrate their wrongful death claims against a health care provider when the decedent signed an agreement consenting to arbitrate their medical malpractice claims pursuant to Code of Civil Procedure section 1295, the wrongful death claims are based on medical malpractice, and the arbitration agreement was intended to bind wrongful death claimants. (*Ruiz v. Podolsky, supra*, 50 Cal.4th 838, 849-854.) However, this action does not involve a wrongful death claim predicated on medical malpractice. (*Bush v. Horizon West* (2012) 205 Cal.App.4th 924, 929.) Rather, Plaintiff Sonia Hernandez's wrongful death claim is predicated on reckless or malicious neglect as defined in the Elder Abuse and Dependent Adult Civil Protection Act. (Welf. & Inst. Code, §§ 15610.57 & 15657; see *Delaney v. Baker* (1999) 20 Cal.4th 23, 30-32, 34-42.) Therefore, the California Supreme Court's holding in *Ruiz v. Podolsky* is inapplicable to this action. Instead, since Plaintiff Sonia Hernandez did not sign the arbitration agreement, she is a third party to the arbitration agreement and cannot be compelled to arbitrate her wrongful death claim against Defendants. (*Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674, 680-686; *Fitzhugh v. Granada Healthcare and Rehabilitation Center, LLC* (2007) 150 Cal.App.4th 469, 474-475.)

Nevertheless, while the Court cannot compel Plaintiff Sonia Hernandez to arbitrate her wrongful death claim, the Court cannot refuse to enforce the arbitration agreement against Plaintiff Abelardo Suarez, acting by and through his successor in interest, Sonia Hernandez, pursuant to Code of Civil Procedure section 1281.2, subdivision (c). In this case, the written arbitration agreement explicitly provides that the "Agreement shall be governed by and interpreted under the Federal Arbitration Act," that "[t]he procedures set forth in the Federal Arbitration Act ... shall govern any petition to compel arbitration[.]" and that "[t]he parties specifically agree, without limitation that California Code of Civil Procedure section 1281.2(c) shall not apply to any claim between the parties." (Notice of Lodgment of Exhibits, Exhibit 1, p. 2, Article

3.) Since the language of the arbitration agreement expressly designates that the Federal Arbitration Act's procedural rules, not the California Arbitration Act's procedural rules, govern this petition and expressly states that Code of Civil Procedure section 1281.2, subdivision (c), is inapplicable, the Court cannot deny Defendants' petition to compel arbitration of Plaintiff Abelardo Suarez's claims pursuant to Code of Civil Procedure section 1281.2, subdivision (c). (*Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1121-1122.)

Third, Plaintiffs contend that the Court should deny the petition to compel arbitration in its entirety because the arbitration agreement is against public policy. Specifically, Plaintiffs argue that, since the arbitration agreement is silent as to the payment of arbitration costs, the arbitration agreement is contrary to public policy as set forth in the Elder Abuse and Dependent Adult Civil Protection Act, citing to *Bickel v. Sunrise Assisted Living* (2012) 206 Cal.App.4th 1. In *Bickel*, the Fifth District Court of Appeal determined that a provision of the arbitration agreement requiring the parties to bear their own fees and costs in connection with the arbitration violated public policy because the provision acted as a waiver of the plaintiff's right to recover attorney fees and costs under the Elder Abuse and Dependent Adult Civil Protection Act. (*Bickel v. Sunrise Assisted Living, supra*, 206 Cal.App.4th 1, 6, 12-13.) In this case, Plaintiffs argue that, since the arbitration agreement is silent as to the payment of arbitration costs and fees, Code of Civil Procedure section 1284.2 requires them to pay their pro rata share of the fees and costs of arbitration, which violates public policy. However, the arbitration agreement is not silent with respect to the payment of arbitration costs and fees because the agreement incorporates JAMS arbitration rules. (Notice of Lodgment of Exhibits, Exhibit 1, p. 2, Article 4.) Therefore, Code of Civil Procedure section 1284.2 is inapplicable. Further, since Plaintiffs have not established that any of the JAMS rules would act as a waiver of Plaintiffs' right to recover attorney fees and costs under the Elder Abuse and Dependent Adult Civil Protection Act, Plaintiffs have failed to establish that the arbitration agreement is against public policy under the reasoning of *Bickel v. Sunrise Assisted Living, supra*, 206 Cal.App.4th 1.

Accordingly, the Court grants Defendants' petition to compel arbitration of Plaintiff Abelardo Suarez's claims, but denies Defendants' petition to compel arbitration of Plaintiff Sonia Hernandez's wrongful death claim.

#### Motion to Stay Proceedings

Defendants move to stay the instant action until the arbitration is complete pursuant to 9 U.S.C. section 3 and Code of Civil Procedure section 1281.4. Since the Court has granted Defendants' petition to compel arbitration of Plaintiff Abelardo Suarez's claims and there is a danger of inconsistent rulings if Plaintiff Sonia Hernandez's wrongful death claim is not stayed, the Court stays the entire instant action pending resolution of the arbitration proceedings or further order of this Court. (9 U.S.C. § 3; Code Civ. Proc., § 1281.4.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order

**Issued By:** MWS **on 08/24/16.**  
(Judge's initials) (Date)

# **Tentative Rulings for Department 502**

(5)

## **Tentative Ruling**

Re: ***State of California, acting by and through the State Public Works Board v. J.G. Mulligan and the heirs and devisees of J.G. Mulligan et al.***  
Superior Court Case No. 15 CECG 02668

Hearing Date: August 25, 2016 **(Dept. 502)**

Motion: Order for Possession of Parcels FB-10-0725-1; FB-10-0725-01-01 and FB-10-07257-02-01

## **Tentative Ruling:**

To deny the motion without prejudice.

## **Explanation:**

On August 24, 2015, the Plaintiff filed a complaint in eminent domain pursuant to CCP § 1250.310 in order to acquire property for the infrastructure of the California High Speed Train (CHST). The property at issue are Parcel Nos. FB-10-0725-1; FB-10-0725-01-01 and FB-10-03725-02-01 of which the State seeks to acquire 7238 square feet. According to the complaint, the property consists of 20 acres of unoccupied agricultural land in the City of Selma, located west of Peach and east of Topeka Avenues.

The Declaration of Sevana Ohanian, attorney for the Plaintiff, filed on August 24, **2015**, indicated that according to her information and belief, the record owner of the property, J.G. Mulligan is deceased and that she knows of no duly qualified and acting representative of his estate. As a result, the Plaintiff named as defendants "the heirs and devisees of J.G. Mulligan, deceased, and all persons claiming by, through, or under said decedent" pursuant to CCP § 1250.220.

On December 2, 2015, the State filed a proof of service indicating that on November 23, 2015, Oliver Mulligan, "co-occupant" of a residence located at 17647 Wasco Avenue in Shafter, CA was served via substitution for Susan Mulligan, "agent for service of process" of the deceased. See proof of service. In the end, the motion seeking an order for possession filed on March 23, 2016 was taken off calendar by the State.

On June 1, 2016, the State filed an application to amend the Complaint to substitution the names of John Mulligan, Timothy Mulligan, Patrick Mulligan, Kathleen Lindberg, Michael Mulligan, George Mulligan, Lou Mulligan, Susan Hardaway, Jane

Brokaw, Jean Mulligan Saulacich, Janet Essick, Joan Saulacich, Bill Saulacich, and Susan Mulligan for Does One through Fourteen. It was granted the same day.

On June 22, 2016, the State filed a motion seeking an order of possession pursuant to CCP § 1255.410(d). However, as with the initial motion, there are problems with the proof of service. First, the Declaration of Ohanian states that J.G. Mulligan was served on November 23, 2015. But, J.G. Mulligan is deceased. It is axiomatic that he could not have been served. Second, the proof of service filed on December 2, 2015 indicates that Susan Mulligan was served as the “agent” for the deceased. But, there is no legal basis for this type of service. The manner of service is completely defective as is the proof of service.

Third, the Declaration of Ohanian states that the “heirs and devisees” were served on January 4, 2016. But, the same defective proof of service was filed showing that Susan Mulligan was served as “agent” for the deceased. Again, there is no legal basis for serving the heirs of J.G. Mulligan in this fashion. Fourth, 14 persons were named as Does on June 1, 2016. Yet, there is no proof of service of the complaint or the motion for these persons. Doe Defendants must be served in a special manner. See *Pelayo v. J.J. Lee Mgmt. Co., Inc.* (2009) 174 Cal.App.4th 484, 496 and CCP § 474.

Ultimately, the manner of service for the Complaint and its amendments is completely defective. See CCP § 415.10 et seq. It is not the Court's responsibility to research whether these individuals need to be served nor how to serve them. Finally, although the State applied for and was granted permission to serve via publication on April 15, 2016, it did not follow through and no proof of service via publication was filed.

Any defendant has a right to object, via demurrer or answer to the plaintiff's right to take. See CCP § 1250.350. In order to do so, it is axiomatic that the defendants in this matter must be properly served. See CCP § 1250.120(a). Given that the Plaintiff has not shown that the complaint or the motion was properly served, the motion will be denied without prejudice.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

## Tentative Ruling

Issued By: DSB on 08/23/16.  
(Judge's initials) (Date)

(17)

**Tentative Ruling**

Re: ***Tobias v. Michael Cadillac, Inc.***  
Court Case No. 16 CECG 01797

Hearing Date: August 25, 2016 (Dept. 502)

Motion: Motion to Compel Arbitration

**Tentative Ruling:**

To deny without prejudice.

**Explanation:**

The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) "Under 'both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate.' " (*Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 (*Cruise*), italics omitted.) Courts therefore recognize that the right to arbitration depends on a contract.

Here, defendant has failed to prove the existence of a contract providing for arbitration by admissible evidence. The motion is accompanied by the Declaration of Jeff Moore, the controller for Michael Cadillac, Inc. since December 16, 1985. Mr. Moore's duties include ensuring that employee receive, have an opportunity to review, and execute the "At-Will Employment and Binding Arbitration Agreements" executed by plaintiff in the instant case, and other training and orientation materials. Mr. Moore declares he is "intimately familiar with that process," and is charged with maintaining accurate records prepared in that regard, and "know[s] that the signature of [plaintiff] is authentic, and that it was [plaintiff] who recorded her signature on and of the Agreement." Additionally, Mr. Moore declares he "personal knowledge" that the At-Will Employment and Binding Arbitration Agreement was presented to plaintiff and that she had an unfettered opportunity to ask questions about, and/or receive satisfactory explanations regarding, any terms of the Agreement.

Declarations or affidavits in support of motions must be from competent witnesses having personal knowledge of the facts stated therein, rather than hearsay or conclusions. (*Pajaro Valley Water Mgmt. Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1107.) In this case, the declaration of Jeff Moore is completely devoid of any factual basis for the conclusion that he has personal knowledge that plaintiff signed the arbitration contract. To qualify as admissible evidence, "[d]eclarations must show the declarant's personal knowledge and competency to testify, state facts and not just conclusions, and not include inadmissible hearsay or opinion." (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761.) Here, because the statements that Mr. Moore is the controller for defendant, it is his duty to ensure that employees receive arbitration

agreements like the one at issue, that he is “intimately familiar with that process,” and is charged with keeping accurate records in that regard, there is no basis for his statement that he has “personal knowledge” that the Agreement was presented to plaintiff and that her signature on it is genuine, could as easily support a conclusion that someone other than Mr. Moore presented the Agreement to plaintiff and saw her sign, the declaration lacks sufficient facts to support the conclusion of personal knowledge.

Accordingly, plaintiff's objection made at page 4, lines 14 through 19, of her points and authorities, that the Moore declaration does not demonstrate sufficient personal knowledge is sustained. With the objection to the Moore declaration sustained there is no evidence of any agreement to arbitrate before the court. However, since the deficiencies in the Moore declaration seem likely to be correctible, the motion is denied without prejudice.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

## Tentative Ruling

Issued By: DSB on 08/24/16.  
(Judge's initials) (Date)

## **Tentative Rulings for Department 503**